TAN SOO HAR v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Criminal Appeal No. 21 of 1974]

Criminal Law and Procedure — Appeal — Sentence — Not unreasonable or manifestly excessive — Firearms (Increased Penalties) Act, 1971.

In this case the appellant had pleaded guilty to a charge of resisting arrest by shooting at the police with an automatic pistol. He was convicted and sentenced to eighteen years' imprisonment.

Held: as there was nothing on the record to show that the sentence imposed was unreasonable or manifestly excessive, the appeal against sentence must be dismissed.

FEDERAL COURT.

Paramjit Singh for the appellant.

Lamin bin Haji Yunos (Deputy Public Prosecutor) for the respondent.

Ali F.J. (read by **Suffian L.P.**): The appellant pleaded guilty to a charge of resisting arrest by shooting at the police with an automatic pistol. He was convicted and sentenced to 18 years' imprisonment to take effect on the expiry of his sentence of 8 years which he was still serving. His appeal against sentence is on the ground that it is unreasonable and manifestly excessive.

Since the maximum sentence allowed by law is 20 years a sentence of 18 years does seem severe. But is it unreasonable and manifestly excessive?

In passing sentence the trial judge took into account that the appellant has a string of previous convictions which do not speak well for him. He has not shown any sign of repentence despite his long years in prison. On the other hand when threatened with arrest he had no hesitation in using a firearm which was later found on him when arrested.

He told the court that he had acted foolishly.

In view of the crime situation in this country particularly in Ipoh where the learned judge has lived for many years and in view of the clear intention of the Legislature in passing the Firearms (Increased Penalties) Act No. 37 of 1971 it must be obvious that the appellant cannot expect leniency from the court. As there is nothing on record to show that the sentence imposed is unreasonable or manifestly excessive we are unable to see how this court can interfere.

We would dismiss the appeal.

Appeal dismissed.

Solicitors: *Seenivasagam & Sons.*

ACME CANNING SENDIRIAN BERHAD v. LEE KIM SENG

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 8, 1975]

[Penang — Federal Court Civil Appeal No. 62 of 1974]

Employment — Claim for damages against former employee — Employee employed as foreman — Alleged breach of implied condition of service — Failure to exercise due skill and care in the supervision and production of canned foodstuffs.

In this case the appellants bought an action against the respondent, a former employee, for damages for negligence. It was alleged that the respondent, who was employed as a foreman in the factory, had failed to exercise due skill and care in the supervision and production of canned foodstuffs. The action was dismissed in the High Court and the appellants appealed.

Held, dismissing the appeal: the learned trial judge was correct in holding that there was no evidence of lack of supervision on the part of the respondent and no evidence to show that he was responsible for the defects in the products of the factory.

FEDERAL COURT.

S. Kulasegeran for the appellants.

Ariffin bin Haji Daud for the respondent.

Ong Hock Sim F.J.: This appeal is from the judgment of Chang Min Tat J. dismissing the appellants' claim against the respondent, a former employee, for special damages in the sum of $46,294.08¢ as well as for general damages for negligence, interests and costs.

In the Statement of Claim in Civil Suit No. 61 of 1973 filed on March 23, 1973, it was alleged, and I quote:—

"4. Further and in addition thereto the plaintiff states that from about 1969 till 20th November, 1972, the defendant was *employed* by the plaintiff *as a foreman* in the factory, *thereby being responsible* for the supervision and proper canning of tin foodstuffs.

5. It was an *implied condition of service* that the defendant shall use all due skill and care in the supervision and *production* of canned foodstuffs.

6. The defendant in breach of the said condition *failed,* refused and/or neglected *to exercise due skill and care in the canning and/or supervision of canning of foodstuffs* that the plaintiff suffered loss, damage and expense as a result of the said negligence by the defendant.

Particulars of Negligence

The defendant failed, refused and/or neglected to exercise due care in the canning of foodstuffs so that the following defects were found:—

(a) Cans were unable to withstand incubation at specified temperatures.

(b) Cans blew up on transportation and incubation.

(c) Cans emitted odours upon analysis and/or incubation.

(d) Cans did not contain the specified ingredients both in quality and quantity.

(e) Insects were found in certain cans."

Particulars of the loss and damage resulting from rejection by the Ministry of Defence under this paragraph showed a total of 46,872 tins valued at $16,294.08¢ which was confirmed by the appellants in evidence-in-chief at page 16 but in cross-examination the total number of cans was reduced by more than half.

This suit was commenced, it was observed by the learned judge, "without a demand or other notice" and the claim, though substantial, might not have been made "but for the claim in the Labour Department" by respondent for overtime. The hearing before the Commissioner for Labour at Butterworth commenced on January 13, 1973 and was concluded only on October 15, 1973 and the record of those proceedings appears at pages 58 to 114 of this Record (pages 13-69 of Part II). It is appalling that a simple claim for overtime, in essence largely factual, should have protracted over some ten months. Objection was taken by respondent's counsel to that line of cross-examination on questions not relevant to a simple claim for overtime — which might have been relevant in a claim for wrongful dismissal. A perusal of the record satisfies me that counsel for the appellants seemed to have taken advantage of that hearing to fish for grounds for institution of counter-proceedings against the respondent.

Despite this apparent advantage, the appellants could not do better than rely on a verbal contract of employment as a foreman (paragraph 4 of the Statement of Claim already quoted) without stating what duties as foreman were prescribed. Instead it was claimed that the respondent became *thereby responsible* for proper canning of foodstuffs. In an oral contract, it was again found necessary to allege *"an implied condition"* to *"use all due skill and care in the supervision and production of canned foodstuffs"* which irresistibly leads to the conclusion that the parties to that contract could never have been *"ad idem"* on this matter, so diametrically opposed was this to the nature of employment accepted. Nowhere is there evidence that the respondent at any time held himself out as possessing the qualification and skill to do the various types of work for which he was now charged to be responsible. In fact as Encik Soon Eng Hin testified before the Commissioner (see page 77): —

"... I was the only mechanic in United Canning. I admit that I was a skilled worker in United Canning and I was employed as a skilled worker in Acme Canning.... I was then the only skilled worker in the factory.... Mr. Lee Kim Seng was then working... as a cook and a supervisor."

The appellants were content to rely on their bare pleadings and Statement of Agreed Facts. This they chose to do, despite express disclaimer of liability in paragraphs 3, 4 and 5 of the Statement of Defence. The respondent categorically stated that his "supervisory duties (were) only confined to manual supervision of the other employees and not others as the defendant does not have the scientific and technical knowledge of the production of can foodstuffs."

In his evidence before the Commissioner for Labour, the appellants' Managing Director, Mr. Lim Eng Leng contend that employment as a factory supervisor involved the following duties:—

"(a) The complainant would be the foreman of the factory and that he was empowered to employ or dismiss factory staff.

(b) The salary of the complainant would be increased by another $60/- per month to a salary of $280/- per month.

(c) The complainant would be responsible for the proper production of the canned food in the factory.

(d) His job as a foreman would be to record the daily production, to see that the seamed cans are correctly processed or sterilised.

(e) That the correct formula is used by the cook.

(f) That good cans are being used for the process.

(g) That no other unwanted materials are filled into the cans.

(h) To set a good example for his subordinates to follow....

(i) The complainant would also continue to get the other benefits that he was getting before such as food allowance, bonus, medical benefits, travelling allowance...."

The respondent says however that his duties were to:—

"(a) Supervise the workers in the production section of the factory;

(b) Substitute the mechanic when he is absent;

(c) Maintain records of the daily production of the factory;

(d) Report the amount of raw materials used for that day to the storekeeper."

The Statement of Agreed Facts sets out these duties as:—

"(a) Supervise the proper canning of tin foodstuffs;

(b) Supervise the workers in the production section of the factory;

(c) Substitute the mechanic when absent;

(d) Maintain the records of the daily production of the factory;

(e) Report the amount of raw materials used for each day to the storekeeper;

(f) Send the canned foods for labelling."

I have set out the three versions of what were alleged to be the conditions of service. There was little discrepancy in the respondent's version and that in the Statement of Agreed Facts except for (a) in the latter. Even agreeing that he should supervise the proper canning of tin foodstuffs, it would not entail the further duties stated in paragraph 4 of the Statement of Agreed Facts or as alleged in paragraph 6 of the Statement of Claim, a *"duty to exercise due care and skill in the canning of foodstuffs."* It is quite obvious the appellants had spelt the word "supervise" to their own advantage beyond its ordinary connotation. As the trial judge further observed: —

"Now under cross-examination, the defendant admitted.... it was my responsibility if anything was wrong with the cans....

This admission was seized on by learned counsel for the plaintiff company as proving his case."

I am wholly in agreement with the judge that this admission alone is insufficient to establish negligence founding an action for damages. The respondent also pleaded that the appellants had no cause of action and upon the facts which I set out below, I agree.

The history of the respondent would show him wholly unfit and unable to carry out the duties appellants purported to assign to him. He was a pupil of Mr. Lim and left while in Form IV. He accepted employment in Mr. Lim's construction and supply business and this is what Mr. Lim had to say of him:—

"Mr. Lee Kim Seng had been in our employ since he left school in 1958. He was in charge of sales of groceries to N.A.A.F.I. for a period of one year. Our company then branched off to construction works and he was switched to take over the more responsible job of Clerk-of-Works and sometimes act as site foreman. This position was held by him from 1959 till 1964 when the company stopped operating as a construction company as the undersigned had commenced the canning business....

He has a thorough knowledge in reading and calculating building plans, R.C. Structures, bridges, syphons, culverts, piling, etc."

From a first-class construction worker, (pay as such not known) as appears from the above, he joined the appellant company as a cook from 1964 to 1969 at a salary of $180 per month and thereafter as a foreman (see page 18 in answer during cross-examination of Mr. Lim). Of this period, Mr. Lim spoke equally highly of him, thus in letter dated November 23, 1972:—

"Mr. Lee Kim Seng had joined us since 1964. He was sent to M/s Metal Box, Singapore for training as a mechanic and subsequently took over as a foreman in our production line .... We have found him to be very reliable, honest, hard-working and intelligent."

This period of training at Metal Box was not very long — appellants say ten days, respondent four — as a seaming-machine operator. Appellants say now the second testimonial was not true and was given out of sympathy. The cause for the respondent's leaving the company was, according to Mr. Lim, before the court and the Commissioner, his attention to the girl-workers and consequent neglect of his work, as a result of which the respondent was offered the alternative of resigning or stopping his flirting. The judge, in those circumstances, felt the question for determination was whether this pre-occupation with the girls amounted to negligence in his work. He found no evidence of neglect of supervision on the part of the respondent. He went on to observe:—

"A consideration of the work that the defendant was called upon to do is revealing. The factory was said to cover a floor area of 14,000 sq. ft.... In this area were the several units. First, there was the unit for the preparation of the food for canning. The fish would have to be gutted, cut and cleaned. The peas would have to be sorted. Then there was the cooking unit. Next, there was the unit where the cans were filled and the sauces added. After that the cans would be sent to the heating unit where heat was applied to create a vacuum, and then the cans would be sealed. The next step would be to put the cans into the retorts where under temperature and pressure the contents would be sterilised. After that, the cans were left to be cooled. The last process would be the labelling, packing and despatch.

These labours occupied a staff of between 70 to 80. The defendant had the help of an assistant supervisor... though the work was basically performed in several stages, no section head was employed. The defendant would appear to be required to be present at one time at several places, ...

He had to be at the several stages before the lids were put on the cans and the cans sealed to ensure that no insects ever got into the cans. But if he was at the cleaning stage, a fly could, for example, have got into the can at the stage when the cooked food was put into the can.

The food was also said to be deficient both in quality and quantity. To ensure the correct quantity at all times, the defendant would have to be present at all these times to oversee the particular workers charged with the task of loading the cans. If he were to do this, he would of course not be able to be present elsewhere. As for the quality of the foodstuff, no allegation was ever made that the defendant was the person charged with the purchases of the raw materials. But the managing director might be charging the defendant with failure to ensure that in cleaning the food and preparing it for canning, sufficient care was not taken to ensure the elimination of food not suitable or up to the standard for canning. But again the question is the possibility of supervision. And the same question arose over the proper seamings of the cans and the sufficiency of the period of sterilisation in the retorts — both operations in the hands of workers over whom the defendant was required to supervise."

No evidence was adduced from any of the workers in each of the sections who detailed them as to the nature of their duties and the manner of their execution. There was no evidence also that the workers had been directed to obtain instructions from the respondent. On the contrary, Mr. Lim himself said:—

"When there is excess fish we employ the sub-contractors to dress fish for example by picul. These categories of workers are strictly not our employees and they do not appear on our wage register. These workers are ad hoc workers....

I am authorised to employ and dismiss workers. It is within my power to offer each employee the terms and conditions of employment.... I do not allocate the duties of each member of my staff. That is why I employ supervisors. *There were 2 supervisors and one assistant with the company at the material time.*

I arranged the time of work of the factory workers. It is the duty of my supervisors to ensure that my rules are carried out by the employees of the factory. I supervise the supervisors....

I am the one who is running Acme Canning, not Mr. Lee Kim Seng."

Why then like the learned judge, I would ask, should the respondent be solely responsible? Why was not the other supervisor or the assistant made co-defendants? Because they did not flirt with the girls?

The claim is so nebulous and so devoid of merit that it was a blatant attempt to fasten liability for the clear negligence of the workers on the respondent as a result of Mr. Lim's own lack or neglect of supervision. The judge found for a fact that the respondent was "asked to perform more work of supervision than any single individual could reasonably perform. He could simply not supervise all the operations which were carried out simultaneously in different parts of the factory."

The Memorandum of Appeal is equally without substance and I would order that this appeal be dismissed with costs.

Gill C.J. and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Ranjit Thomas & Kula; Ariffin & Co.*

TIUN ENG JIN v. WONG SIE KONG

[O.C.J. (B.T.H. Lee J.) November, 18, 1974]
[Kuching — Civil Suit No. K. 74 of 1968]

Contract — Claim of plaintiff for balance of sum of money due from defendant — Accord and Satisfaction — Plaintiff agreeing to receive certain goods and to withdraw the whole matter — Written agreement drafted by plaintiff — Allegation that agreement related to judgment debtor summons and not to whole case — Contra proferentem rule — Equitable estoppel.

The plaintiff had originally on 22.5.1968 brought an action to recover the sum of $73,901.28 with interest and costs. Subsequently after the defendant had filed his defence the plaintiff filed an amended statement of claim for $64,560.24. When the matter came before the court on 18.8.1970 judgment by admission was entered against the defendant for $27,688.70, leaving the balance of $36,871.54. On 12.3.1971 the parties signed an agreement whereby the plaintiff agreed to accept certain goods and articles from the defendant and "agreed to withdraw the whole matter from the court case." Subsequently on 30.1.1972 the plaintiff applied for judgment against the defendant for the balance of $36,871.54.

Held: (1) as in this case the plaintiff had agreed to accept the goods and articles in satisfaction of his claim for money, there had been accord and satisfaction;